

TRYGVE M. OLSEN

IBLA 94-372

Decided March 6, 1997

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application AA-6373, Parcel C.

Affirmed.

1. Alaska: Native Allotments--Withdrawals and Reservations

When a Native allotment application describes land withdrawn from all forms of appropriation under the public land laws at the time when the applicant initiated use and occupancy, a BLM decision rejecting the application will be affirmed regardless of whether the lands were being used for the purpose for which they were withdrawn at the time occupancy was initiated.

APPEARANCES: Trygve M. Olsen, Kenai, Alaska, pro se; Carlene Faithful, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Trygve M. Olsen has appealed from a March 3, 1994, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his Native allotment application, AA-6373, for Parcel C. The rejection was based on a determination that use and occupancy was initiated after the land had been reserved for Air Navigation Site (ANS) No. 157.

The application was filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1994), on December 18, 1971, subject to pending applications). Under the Act a Native allotment applicant is entitled to up to 160 acres of "vacant, unappropriated, and unreserved" land upon satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. §§ 270-1 and 270-2 (1970). BLM does not dispute that appellant's Native allotment application AA-6373 for Parcel B and Parcel C, encompassing approximately 2.5 acres and 40 acres, respectively, located within secs. 11 and 12, T. 5 S., R. 33 W., Seward Meridian, was timely filed. A Certificate of Allotment (No. 50-93-0617) was issued for Parcel B on September 30, 1993, but the application was rejected as to Parcel C by the decision under appeal. BLM rejected the application for Parcel C because it determined the land sought was not "vacant, unappropriated, and unreserved" land.

On April 19, 1941, approximately 256.5 acres in the vicinity of Lake Iliamna were withdrawn from all forms of appropriation for ANS No. 157. Over the next few years the size of ANS and its boundaries were amended. Additional land was included in ANS No. 157 by orders of November 6, 1941, and January 12, 1942. By order dated July 24, 1942, the boundaries of ANS No. 157 were changed by the addition of approximately 2,007 acres and the elimination of approximately 415 acres. While the July 24, 1942, order provided that Natives had the right to cross the reserve in travelling to their hunting grounds, all of the withdrawals stated that the land was withdrawn from all forms of appropriation under the public land laws, subject to valid existing rights. The withdrawal is still in effect. The boundaries for ANS No. 157 were surveyed in 1944 as U.S. Survey No. 2644, Alaska Iliamna Air Navigation Site, and the land description for ANS No. 157 was conformed to the survey by order dated October 1, 1951. In his application for AA-6373, Parcel C, appellant described an unsurveyed parcel of land located within Lot 7, U.S. Survey No. 2644, Alaska.

[1] An applicant acquires no rights against the United States capable of defeating a withdrawal until he has initiated qualifying use and occupancy under the statute. To be valid, any claim of such use and occupancy must have been initiated prior to any withdrawal of the land. See Andrew Gordon McKinley (On Reconsideration), 61 IBLA 282, 285 (1982). If it can be shown that the rights he claims were properly initiated prior to withdrawal the applicant can perfect his application by continued qualifying use and occupancy for the required 5-year period, with the remainder of the period of use and occupancy being completed after the withdrawal. See United States v. Bennett, 92 IBLA 174, 175 (1986). If, however, qualifying use and occupancy was not initiated before withdrawal, the withdrawal will attach. Thereafter, use and occupancy cannot be initiated, and an applicant can gain no rights. See Akootchook v. U.S. Department of the Interior, 747 F.2d 1316, 1320, cert. denied, 471 U.S. 1116 (1985); Heirs of Doreen Ifta, 97 IBLA 261, 266 (1987).

Appellant does not claim to have initiated use and occupancy prior to the withdrawal. In his statement of reasons he claims use and occupancy of Parcel C by his family since 1965. In his application, he claimed actual residence on Parcel C commencing in 1966. The discrepancy is of no concern in the context of this case since both dates are after the land was withdrawn and while the withdrawal was still in effect. Thus, appellant cannot claim to have gained any rights prior to withdrawal.

Appellant does not dispute BLM's determination that Parcel C is within ANS No. 157 or that the land is still withdrawn. However, he argues that the navigation aids had been moved to the Iliamna Airport "a long time ago" and therefore his application should not be rejected. Essentially appellant argues that because the land is no longer used for the purpose for which it was originally withdrawn, his application should be approved. However, we need not determine whether the land is now being used for air navigation purposes or whether it was being used for that purpose when he initiated use and occupancy. It has long been held that land which has been withdrawn from entry under some or all of the public land laws remains so withdrawn until there is a formal revocation or modification of the

order of withdrawal. Whether the lands are presently being used for the purpose for which they were withdrawn is not material. James E. Morgan, 104 IBLA 204, 205 (1988); Samuel P. Speerstra, 78 IBLA 343, 344 (1984); Ronald W. Ramm, 67 IBLA 32, 34 (1982); David W. Harper, 74 I.D. 141 (1967). So long as the withdrawal is in effect no qualifying use and occupancy can be initiated. Since Native allotment applications are restricted to "vacant, unappropriated and unreserved" lands, BLM properly rejected the application on the well established principle that a Native allotment application must be rejected when it is clear from the record that use and occupancy was initiated at a time when the land was withdrawn. See, e.g., Harold Ahmasuk, 96 IBLA 42, 44 (1987); Stanislaus Mike, 56 IBLA 69, 72 (1981). 1/

Appellant admits that his use and occupancy began after the land was withdrawn for ANS No. 157 and that the withdrawal is still in effect. Accordingly, we are unable to find that the lands at issue have been available for initiation of use and occupancy under the Alaska Native Allotment Act and, hence, the BLM decision must be affirmed. Because the land was never open during the time appellant claimed use, it is immaterial whether he could establish actual use and occupancy which would otherwise qualify under the Native Allotment Act. 2/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

1/ Although certain Native allotment applications pending before the Department on or before Dec. 18, 1971, were statutorily approved pursuant to section 905(a)(1) of the Alaska National Interest Lands Conservation Act, enacted Dec. 2, 1980, this statutory approval did not extend to applications describing lands which were reserved on Dec. 13, 1968. 43 U.S.C. § 1634(a)(1) (1994). Accordingly, appellant's application was properly adjudicated under the Native Allotment Act as was done in this case.

2/ An evidentiary hearing is not required in this case. Taking all averments of the application as true, the application is insufficient on its face to establish a claim to Parcel C, as a matter of law. Franklin Silas, 117 IBLA 358, 364 (1991), petition for review denied, In the Matter of Franklin Silas, 9 OHA 173 (1992), clarified, Franklin Silas (On Judicial Remand), 129 IBLA 15 (1994), aff'd, Civ. No. A93-035CV(JKS) (D. Alaska 1995), aff'd, Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996).

